



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Application of San Diego Gas & Electric Company (U 902 G) and Southern California Gas Company (U 904 G) for Authority to Revise Their Rates Effective January 1, 2009, in Their Biennial Cost Allocation Proceeding.

Application 08-02-001
(Filed February 4, 2008)

**DIVISION OF RATEPAYER ADVOCATES MOTION TO STRIKE
PORTIONS OF SAN DIEGO GAS AND ELECTRIC COMPANY AND
SOUTHERN CALIFORNIA GAS COMPANY TESTIMONY**

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March 7, 2008

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I. INTRODUCTION

In accordance with Rules 1.7 and 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission's ("Commission"), the Division of Ratepayer Advocates ("DRA") submits this motion to strike portions of San Diego Gas and Electric Company ("SDG&E") and Southern California Gas Company's ("SoCalGas") (collectively, "Applicants") prepared testimony in the above-captioned Biennial Cost Allocation Proceeding ("BCAP") proceeding.

DRA moves to strike portions of the Prepared Direct Testimony of Herbert S. Emmrich relating to Applicants' proposed core storage inventory level.¹ Mr. Emmrich's testimony states that the Commission should adopt 70 Billion cubic feet ("Bcf") as the appropriate level of storage capacity for Applicants' core requirements because a recently issued Commission decision, Decision 07-12-019 ("Omnibus Decision"), provided that the instant BCAP proceeding is the proper forum to determine Applicants' appropriate core storage reservation level. However, the Omnibus Decision, adopted in December 2007, outright rejected Applicants' previous request for approval of 70 Bcf of storage

¹ Attachment A provides the portions of Mr. Emmrich's testimony to be stricken.

capacity for the combined core portfolio. The Commission did approve the Applicants' request for a combined SoCalGas and SDG&E core portfolio *only* on condition that the combined storage capacity of 79 Bcf is preserved.²

The Omnibus Decision regarding the Applicants' request for 70 Bcf of storage capacity did not leave the issue open for re-litigation in the instant BCAP proceeding. Therefore, DRA respectfully requests that the Commission strike those portions of Applicants' testimony regarding their proposed level of 70 Bcf of storage inventory capacity because the testimony: 1) mischaracterizes the Omnibus Decision, 2) improperly attempts to re-litigate issues already decided in the Omnibus Decision, and 3) impermissibly collaterally attacks that previous Commission decision.

II. DISCUSSION

A. The Omnibus Decision Adopted 79 Bcf as Applicants' Appropriate Core Storage Level and Allowed the BCAP proceeding to reexamine whether an Extra 4 Bcf of Storage Should be Added to the Adopted 79 Bcf.

1. The Commission rejected Applicants' proposal of 70 Bcf of core storage inventory.

The Omnibus proceeding was initiated by an application jointly filed by Southern California Edison ("SCE"), SoCalGas and SDG&E requesting Commission approval of a settlement agreement³ and associated changes to the operations of SoCalGas and SDG&E,⁴ including consolidation of the two utilities' core gas portfolios. In the settlement, SCE, SoCalGas and SDG&E agreed that the combined core inventory storage for both SoCalGas and SDG&E should be 70 Bcf.⁵ DRA opposed the Applicants' request for 70 Bcf of storage on the grounds that this level was too low for reasons explained in

² See D.07-12-019 p.31 ("we conclude that the consolidation of the core portfolios is reasonable, but *only* on the condition that the combined storage capacity of 79 Bcf is preserved.")

³ Settlement parties included Sempra International and other Sempra affiliates. No ratepayer representatives were parties to the settlement agreement.

⁴ See Decision ("D.") 07-12-019, *mimeo.* at 2-3.

⁵ See Application 06-08-026, p. 6.

its Direct Testimony⁶ and recommended that the Commission instead adopt 83 Bcf, which includes 79 Bcf of combined inventory capacity and an additional 4 Bcf held by SoCalGas as a result of its Cushion Gas proceeding.⁷ SCE, SoCalGas and SDG&E opposed DRA's recommendations.⁸

Extensive hearings were held and the record on this issue was well developed by DRA, SCE, SoCalGas, and SDG&E. On November 5, 2007, the Proposed Decision ("PD") of Administrative Law Judge Thomas R. Pulsifer was issued.⁹ The PD discusses at length Applicants' and SCE's request for 70 Bcf versus DRA's recommendation of 83 Bcf. The PD states, "Applicants characterize the proposed reduction [to 70 Bcf] in inventory and injection as an 'important element' of the Edison Settlement."¹⁰ The PD further states that "DRA argues that the 83 Bcf level is necessary for adequate storage inventory for the combined portfolio."¹¹ The PD then holds, "we decline to approve Applicants' proposed reduction in the levels of core storage inventory" to 70 Bcf,¹² and follows with a thorough explanation of the basis for its rejection of Applicants' proposal. For example, the PD finds that the reduction to 70 Bcf would not directly benefit noncore customers.¹³ The PD explains that because 70 Bcf of core storage inventory results in detrimental effects on core customers, Applicants' request for 70 Bcf of storage is rejected.¹⁴

It is important to note that the Commission in its final decision adopted verbatim the PD's rejection of the 70 Bcf of core storage inventory and applied the same analysis.

⁶ Ex. 71, DRA/Sabino, p.15 – p.17 in A.06-08-026.

⁷ See DRA's protest, opening brief, reply brief, comments on the PD in the Omnibus proceeding, A.06-08-026.

⁸ See SCE, SoCalGas and SDG&E's reply to DRA's comments, briefs, and notices of *ex parte* meetings in the Omnibus proceeding, A.06-08-026.

⁹ See Proposed Decision ("PD") of ALJ Pulsifer, A.06-08-026, issued Nov. 5, 2007.

¹⁰ PD, *mimeo.* at 21.

¹¹ PD at 22.

¹² PD at 23.

¹³ See PD at 28.

¹⁴ See PD at 29.

Between the time of the PD's issuance and the adoption of the final decision, parties filed comments and conducted *ex parte* meetings. Applicants, in their comments on the PD and in *ex parte* meetings with Commissioner Offices, expressed their opposition to the PD.

In their opening comments on the PD, SoCalGas and SDG&E acknowledged: "The PD rejects the core storage inventory and injection set asides proposed by Applicants [70 Bcf of inventory] and instead requires the combined core portfolio to maintain the existing combined storage capacities [83 Bcf inventory capacity]...." Noting that "[the PD] concludes that the somewhat lower combined core inventory and injection reservations proposed by Applicants would have detrimental effects on core customers,"¹⁵ Applicants argued that "[Applicants' witness] Mr. Goldstein has testified that reliability would not be compromised by the combined core reservations of 70 Bcf."¹⁶ Applicants then proposed that the PD be modified to adopt instead 70 Bcf as the appropriate level of storage inventory for the combined portfolio.

The Commission adopted a final decision on December 6, 2007, leaving intact the PD's conclusion and its discussion of why Applicants' proposal for 70 Bcf is not in the public interest and should be rejected.¹⁷ In rejecting Applicants' proposal for 70 Bcf and adopting a reservation of 79 Bcf, the Commission found: "Applicants' proposal to reduce the core storage inventory capacity below 79 Bcf and related daily injection rights in conjunction with consolidation of the SoCalGas/SDG&E portfolios would not be in the public interest."¹⁸ Moreover, the Commission approved the consolidation of Applicants' core portfolios contingent on the combined portfolio's maintaining 79 Bcf of storage inventory:

Applicants' proposal to consolidate the core portfolios of SoCalGas and SDG&E is hereby granted on the condition that *existing combined core storage capacity remain in effect*. The approved storage capacity for the

¹⁵ SoCalGas/SDG&E Opening Comments on Omnibus PD, A.06-08-026, p. 10.

¹⁶ *Id.*

¹⁷ See D.07-12-019, *mimeo.* at 21-22.

¹⁸ D.07-12-019, Finding of Fact 11, *mimeo.* at 104.

combined core portfolio is 79 Billion Cubic Feet (Bcf), with daily injection capacity of 369 Million cubic feet per day (MMcf/d) and daily withdrawal capacity of 2,225 MMcf/d.¹⁹

Therefore, the approval of a combined portfolio of SoCalGas and SDG&E is clearly based on maintaining 79 Bcf for the combined portfolios. If the 79 Bcf of combined storage is modified to 70 Bcf, then it necessarily follows that the core portfolios must be unconsolidated as well.

Both the PD and the final Omnibus Decision are clear: Applicants' request for 70 Bcf of core storage inventory is rejected. Nowhere does the decision state or imply that the 70 Bcf issue should be revisited in this BCAP or in any other proceeding. The Omnibus Decision was not an interim decision to be effective a mere two months until the BCAP proceeding was initiated. Yet here, Applicants have submitted testimony once again requesting 70 Bcf of core storage inventory, and offering a blatant mischaracterization of the Omnibus Decision as grounds to improperly relitigate an issue on which Applicants lost in the Omnibus proceeding.

2. The Omnibus Decision held that only the 4 Bcf issue could be revisited in this BCAP.

The final Omnibus Decision adopted 79 Bcf as the appropriate core storage reservation level for Applicants' combined portfolio, a 4 bcf change from the original holding in the PD which adopted 83 Bcf. The Omnibus decision allowed a reexamination of the 4 Bcf of storage in the instant BCAP, not the reexamination of Applicants' 70 Bcf proposal rejected by the Commission in the Omnibus Decision.

In the Cushion Gas proceeding, A.05-10-012, SoCalGas filed an application requesting that the Commission allocate 4 Bcf of extra incremental storage capacity to core customers for use as a hedge against high natural gas prices resulting from the increased gas prices during the winter of 2005-2006.²⁰

In its decision on the application, D.06-12-010, the Commission approved SoCalGas' application and allocated the extra 4 Bcf of storage capacity to SoCalGas'

¹⁹ D.07-12-019, Ordering Paragraph 4, *mimeo.* at 114 (emphasis added).

²⁰ See D.06-12-010, p.1.

storage inventory.²¹ The Commission made clear that this ‘4 Bcf’ allocation was interim, “and may change based on reexamination of core and non core storage needs in the next BCAP or another appropriate proceeding.²²” In the Cushion Gas proceeding, SCE opposed the interim allocation to core and requested that the 4 Bcf be allocated to the noncore on an interim basis and that such interim allocation be reexamined in the next BCAP.²³ The Commission rejected SCE’s request to allocate the 4 Bcf to the noncore, but agreed with SCE that the interim allocation of the 4 Bcf be reexamined in the next BCAP.²⁴

The conclusions of law in D.06-12-010 provide, “The interim capacity authorized today should be comprehensively reexamined in SoCalGas’ next BCAP or another appropriate proceeding ... Based on our BCAP examination or examination in another appropriate proceeding, **we may adjust**, on a going forward basis, the **allocation that we approve today**.”²⁵ Therefore, the Commission intended that the 4 Bcf allocation approved in D.06-12-010 be reexamined in the BCAP.

In the Omnibus decision, the Commission’s discussion of reexamining the storage capacity is **based** on the Cushion Gas decision, D.06-12-010.²⁶ Any discussion of reexamining the gas storage inventory in the Omnibus decision reflects the intent of the Cushion gas decision.²⁷ The final Omnibus Decision excluded the 4 Bcf of inventory and adopted 79 Bcf as the appropriate core storage reservation level for Applicants’ combined portfolio.²⁸ The allocation was based on SoCalGas’ storage capacity of 70 Bcf and SDG&E’s storage capacity of 9 Bcf.²⁹

²¹ D.06-12-010, p. 1.

²² *Id.* at 1.

²³ D.06-12-010, p.5.

²⁴ *Id.*

²⁵ D.06-12-010, Conclusion of Law 2 and 3, *mimeo.* at 7 (emphasis added).

²⁶ See D.07-12-019, *mimeo.* at 25-26.

²⁷ *Id.* p. 25.

²⁸ D.07-12-019 pp. 21-22.

²⁹ *Id.*

As the final Omnibus decision explained, “In adopting the 79 Bcf figure, we exclude the additional 4 Bcf of cushion gas that DRA proposed to include to arrive at a total of 83 Bcf of core storage for the combined portfolio.”³⁰ Appended to this sentence is the following footnote: “As noted by DRA, its recommendation for core storage in this proceeding applies only through the year 2008. From 2009 and beyond, the appropriate level of core storage inventory will be subject to determination in the next BCAP. The footnote is an apparent reference to the “Note” below the Table 3 Attachment to DRA’s Direct testimony in A.06-08-026. That Note states “DRA’s recommended combined core storage inventory of 83 Bcf, included the 4 Bcf in D.06-12-010, and SDG&E’s current 9Bcf of core storage inventory. From 2009 and beyond, the combined storage inventory in DRA’s recommendation is only an estimate that is subject to determination in the next BCAP.”

In the next paragraph, the Omnibus decision stated:

By allocating the **4 Bcf of incremental storage capacity** to core customers, we provided SoCalGas additional tools to protect CARE and core customers against high natural gas prices. **This allocation of incremental storage capacity was only interim.** We indicated in D.06-12-010 that **the allocation may change based on the reexamination of core and non-core storage needs in the next Biennial Cost proceeding (BCAP)** or another appropriate proceeding.³¹

Pursuant to the Commission’s directive in D.06-12-010, the Omnibus decision provided, “Accordingly, we will not include the additional 4 Bcf as a requirement for the combined core portfolio, **at least for the limited period until reexamination in the upcoming BCAP.**”³²

It is obvious the ‘reexamination’ the Omnibus decision discussed refers only to reexamine the allocation of the 4 Bcf of core storage inventory. Despite the clear holding of the Omnibus decision deferring the examination of the 4 Bcf storage allocations to the instant BCAP, the Applicants mischaracterize the decision to mean something else.

³⁰ D.07-12-019 at 25.

³¹ *Id.* at 25-26; Attachment B illustrates that the Commission actually refers to the reexamination of the 4 Bcf only.

³² D.07-12-019, *mimeo.* at 25-26 (emphasis added); Attachment B illustrates that the Commission actually refers to the reexamination of the 4 Bcf only.

B. Applicants' Testimony Mischaracterizes the Omnibus Decision

Applicants' testimony proposes 70 Bcf of storage inventory capacity for the combined portfolio's core requirements, "a [9] Bcf reduction from the level adopted in the Omnibus Decision."³³ Applicants' purported justification for their proposal is their apparent belief that "the Omnibus Decision provided that this BCAP is an appropriate forum to provide additional information in considering an appropriate core storage reservation level."³⁴ Applicants' statement is plain wrong. As DRA demonstrates above, the "reexamination" the Omnibus Decision refers to is that of the 4 Bcf issue.

The Omnibus Decision intended the BCAP proceeding to be the forum in which to determine whether Applicants' core storage inventory level should remain at 79 Bcf as adopted in the decision or whether to increase it by the 4 Bcf of cushion gas to a total of 83 Bcf. The BCAP is not, as Applicants claim, the "appropriate forum to provide additional information in considering an appropriate core storage reservation level." The appropriate core storage reservation level for the combined core portfolio was already determined to be 79 Bcf in the Omnibus Decision. Applicants participated in the Cushion Gas and Omnibus Proceedings. Applicants filed comments and lobbied the Commission to change the Omnibus PD's rejection of 70 Bcf. The PD was not altered as Applicants proposed, and the final decision rejected Applicants' request for 70 Bcf and provided a detailed rationale as to why Applicants' proposal of 70 Bcf was not in the interest of ratepayers.

The Commission in the Omnibus Decision rejected Applicants' proposed level of 70 Bcf of core storage inventory, approved 79 Bcf as the appropriate level, and deferred to the BCAP only the issue of whether the 4 Bcf of cushion gas available to Applicants should be added to their core storage reservation requirement to make the total 83 Bcf going forward. The Commission discussed reexamination of the core storage issue solely with regard to the 4 Bcf of cushion gas. Nowhere in the discussion supporting rejection

³³ SDG&E-SoCalGas/Emrrich Ch.4 p.30 .

³⁴ *Id.*

of Applicants' 70 Bcf proposal does the Commission even mention potential reexamination of that issue in a future proceeding. In mentioning the word "reexamination," the decision follows with "**accordingly, we will not include the additional 4 Bcf . . . until reexamination in the upcoming BCAP³⁵.**"

It is difficult to fathom how the Omnibus Decision's language could be misinterpreted by the very parties in the proceeding who were active on the issue and presumably understood what was going on. Yet Applicants seem to be doing just that here. DRA understood that the 4 Bcf would be litigated in the BCAP *even before* the Commission issued its decision. In its opening brief, dated approximately six months before the final decision was issued, DRA discussed that the "additional 4 Bcf of storage inventory . . . is subject to review in the next BCAP."³⁶

Their vigorous attempts to ensure that the Omnibus decision adopt 70 Bcf of storage inventory demonstrates that the Applicants knew that the Omnibus decision's allocation would be final. Applicants are mischaracterizing the Omnibus Decision in a blatant attempt to get a second bite at the apple and relitigate its 70 Bcf proposal, which the Commission has already decided against Applicants' favor in the Omnibus proceeding.

C. Applicants' Testimony Improperly Re-litigates and Collaterally Attacks a Final Commission Decision

The Commission should strike those portions of Applicants' prepared direct testimony that reargue issues the Commission has already recently resolved in its final decision in the Omnibus proceeding.³⁷ The issue of whether to adopt the Applicants' proposed storage level of 70 Bcf has been thoroughly addressed, examined and briefed in the Omnibus proceeding, and the result of that extensive litigation was a *final* Commission determination rejecting Applicants' request on the basis that 70 Bcf is too

³⁵ D.07-12-019, *mimeo.* at 25-26 (emphasis added). Attachment B illustrates that the Commission actually refers to the reexamination of the 4 Bcf only.

³⁶ DRA Opening Brief for A.06-08-026, p.9.

³⁷ See Attachment A.

low and will harm ratepayers.³⁸ Indeed, the Commission approved the consolidation of Applicants' core portfolios only on the condition that the adopted storage inventory capacity level of 79 Bcf for the combined portfolio remain in effect.³⁹

Yet Applicants' prepared direct testimony in this BCAP states that the storage capacity reservation be reduced "from the level adopted in the Omnibus Decision."⁴⁰

In the Omnibus proceeding, Applicants submitted testimony and briefs, and argued that their storage inventory should be 70 Bcf.⁴¹ DRA opposed this request in its own testimony and briefs.⁴² The Commission rejected the Applicants request in Omnibus Decision and stated that the storage inventory should be 79 Bcf, not 70 Bcf.⁴³ The Commission provided no opportunity to revisit the issue in this proceeding or any other collateral proceeding. As thoroughly discussed and demonstrated in section A.2 above, the Commission only provided an opportunity to revisit whether it should make permanent the approved extra 4 Bcf of storage inventory for the core customers. However, the applicants, in their testimony, have asked the Commission to revisit and change the Omnibus Decision by asking for 70 Bcf again. As discussed in section A above the applicants misleads the Commission by stating that the Omnibus Decision allows for the instant proceeding to relitigate their entire storage inventory. The Omnibus Decision only left the issue of the extra 4 Bcf to be addressed in the instant BCAP.

As demonstrated above, the Commission has already rejected the Applicants' request for 70 Bcf of cores storage inventory. And, the Commission did not state that its

³⁸ See D.07-12-019, *mimeo.* pp. 21-22, 31 (The Commission stated "Given these detrimental effects on core customers, we decline to approve Applicants' request to reduce core storage levels... we conclude that the consolidation of the core portfolio is reasonable, but only on the condition that the combined storage capacity of 79 Bcf is preserved"); D.07-12-019, Finding of Fact 11, *mimeo.* at 104.

³⁹ See D.07-12-019, Ordering Paragraph 4, *mimeo.* at 114, 25.

⁴⁰ SDG&E-SoCalGas/Emrrich Ch.4 p.30.

⁴¹ See A.06-08-023 Docket: Opening Brief of SDG&E/SoCalGas pp. 19 -20; Reply Brief of SDG&E/SoCalGas pp. 12-19; Ex. 73 SDG&E/SoCalGas; and D.07-12-019, *mimeo* pp. 21-22.

⁴² See A.06-08-023 Docket: Ex. 71 (Sabino/DRA). D.07-12-019, *mimeo* p. 23.

⁴³ See D.07-12-019, *mimeo.* Pp. 21-22, 31 (The Commission stated "Given these detrimental effects on core customers, we decline to approve Applicants' request to reduce core storage levels... we conclude that the consolidation of the core portfolio is reasonable, but only on the condition that the combined storage capacity of 79 Bcf is preserved"); D.07-12-019, Finding of Fact 11, *mimeo.* at 104.

holding on this issue may be reexamined in the instant BCAP proceeding. For the Applicants to once again ask for the same relief constitutes a collateral attack on a previous final Commission decision. Collateral attacks of Commission decisions are prohibited.⁴⁴ The Commission and the California Supreme Court have held that in all collateral actions or proceedings, the orders and decisions of the Commission that have become final shall be conclusive.⁴⁵ The conclusiveness of a decision arises by operation of law.⁴⁶

The Omnibus decision rejected the Applicants' current request for 70 Bcf of core storage inventory. The Omnibus decision is final, conclusive, and binding. By requesting 70 Bcf of inventory in this proceeding, the Applicants are impermissibly challenging a conclusive Commission decision. Portions of the application and testimony are an improper collateral attack on a final Commission decision because they challenge the conclusions in the Omnibus decision.

Due process of law provides the Applicants an opportunity to modify a final Commission decision by filing an Application for Rehearing or a Petition to Modify. In fact, the Applicants filed a Petition to Modify the Omnibus decision on January 9, 2008, but excluded a review of Omnibus' rejection of 70 Bcf of inventory. Instead of following a proper legal recourse, Applicants chose to collaterally attack the Omnibus decision by relitigating the issue.

To have the issue litigated again is not only illegal, but also an inefficient use of participants' time and resources. The Commission and parties spend valuable time and considerable effort to litigate and resolve issues brought before the Commission. Re-litigation of the 70 Bcf issue here would result in an unwarranted duplication of effort, impose unnecessary burdens on the Commission and parties, and delay the outcome of this proceeding.

⁴⁴ See D.05-10-016; D.05-06-030; D.02-03.055; *Pub. Util. Code* § 1709.

⁴⁵ *People v. Western Air Lines, Inc.* (1954) 42 Cal 2d 621, 268 P2d 723, 1954 Cal LEXIS 193, ;D.07-10-015, 2007 Cal. PUC LEXIS 552, at *11, (2007); D.06-01-046, 2006 Cal. PUC LEXIS 29 (2006).

⁴⁶ *Id.*; *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 632-633).

III. CONCLUSION

The Commission should strike those portions of Applicants' prepared direct testimony related to their proposed level of 70 Bcf of core storage inventory. The Applicants are merely rearguing positions that the Commission has already rejected. In their effort to reargue the same positions, the Applicants purposefully mislead the Commission by mischaracterizing the Omnibus decision.

Respectfully submitted,

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March 7, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document
“**DIVISION OF RATEPAYER ADVOCATES MOTION TO STRIKE PORTIONS
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Executed in San Francisco, California, on the 7th day of **March, 2008**.

/s/ REBECCA ROJO

Rebecca Rojo

N O T I C E

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